

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

HARRY D. WEIST, and
DIANE M. WEIST,

Plaintiffs,

v.

E.I. DUPONT DE NEMOURS AND COMPANY,
FIRST CHEMICAL CORPORATION,
GOODYEAR TIRE & RUBBER CO.,

Defendants.

DECISION AND ORDER
05-CV-534S

1. On February 8, 2008, the Hon. H. Kenneth Schroeder Jr., United States Magistrate Judge, issued a Report and Recommendation (Docket No. 82, "R&R") recommending that this Court grant Defendants' Motions for Partial Summary Judgment (Docket Nos. 18 & 19) seeking dismissal of paragraph 20(g) of the Complaint.

2. The Report and Recommendation recommended granting Defendants' Motions partly on the basis that there was no duty owed to Plaintiff under the theory of negligent entrustment. (R&R, Docket No. 82, p. 9). The Court reasoned that "there is no competent evidence before the Court to suggest that defendants had any reason to question Goodyear's competence to handle ortho-toluidine." (R&R, Docket No. 82, p. 11).

3. On February 15, 2008, Plaintiffs filed Objections to the Report and Recommendation. (Docket No. 83). Plaintiffs contend that the Magistrate Judge erred in granting Defendants' Motions based on a factual finding. Under the circumstances, such finding was erroneous because discovery on this issue was not complete and had been stayed. (Plaintiffs' Objections, Docket No. 83, pp. 9-12).

4. This Court finds Plaintiffs' argument persuasive. The Court's determination of whether a duty existed under a theory of negligent entrustment was partly dependent

on facts, and there had not yet been discovery on this issue. This Court will therefore reject the Magistrate Judge's recommendation that Defendants' Motions for Partial Summary Judgment (Docket Nos. 18 & 19) be granted. Defendants' Motions for Partial Summary Judgment (Docket Nos. 18 & 19) are denied without prejudice, with leave to renew before the Magistrate Judge when sufficient discovery has been completed.

IT HEREBY IS ORDERED, that this Court rejects the February 8, 2008 Report and Recommendation. (Docket No. 82).

FURTHER, that Defendants' Motions for Partial Summary Judgment (Docket Nos. 18 & 19) are DENIED without prejudice.

FURTHER, that the Parties shall contact Judge Schroeder's Chambers to schedule a status conference to discuss how to proceed in this matter.

SO ORDERED.

Dated: March 31, 2008
Buffalo, New York

/s/William M. Skretny
WILLIAM M. SKRETNY
United States District Judge